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SUPREME COURT, U. S.
JUL 2 1974
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1962

JOSEPH BERMAN,

Petitioner,

v.

GROUP HEALTH ASSOCIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Joseph Berman, Petitioner
9039 Sligo Creek Parkway
Silver Spring, Md. 20901

After July 30, 1974
address will be:
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I. THE DISTRICT OF COLUMBIA COURT OF APPEALS DID NOT COMPLY WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN NOT DISMISSING THIS CASE ON THE ISSUE OF JURISDICTION. IT FURTHER ERRED FOR NEGLECTING TO EVEN CONSIDER AND RULE ON WHETHER THE DISTRICT OF COLUMBIA SUPERIOR COURT HAS JURISDICTION OVER A MARYLAND CITIZEN NOT DOING BUSINESS IN THE DISTRICT OF COLUMBIA, AND CONCERNING FUNDS WHICH HAVE NO CONNECTION WITH THE DISTRICT OF COLUMBIA.

II. THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT,-DENYING TRIAL BY JURY;-

A. WITHOUT ANY EVIDENCE FOR RESPONDENT, WHILE DISREGARDING ALL THE EVIDENCE PRODUCED BY PETITIONER;

B. HOLDING PETITIONER RESPONSIBLE FOR THE PRODUCTION OF THE ORIGINAL BYLAWS, WHEN IT WAS CLEARLY EVIDENT THAT RESPONDENT WOULD BE THE ONLY ONE

IN POSSESSION OF THEM,-AND DID NOT PRODUCE THEM WHEN REQUESTED TO UNDER CIVIL RULE 34 AND THE SUBSEQUENT ORDER OF THE SUPERIOR COURT; AND

C. WITHOUT CONSIDERING THE ACTS OF WAIVER ON THE PART OF RESPONDENT TO ESTOP RESPONDENT, OR TO AT LEAST, REMAND FACTS FOR A JURY.

Appendix:

A. Decision of the District of Columbia Court of Appeals, pp. 1-3----------

B. Order, filed April 3, 1974, denying petition for rehearing of the District of Columbia Court of Appeals decision.----------

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

JOSEPH BERMAN,

Petitioner,

v.

GROUP HEALTH ASSOCIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Joseph Berman, defendant in the Superior Court of the District of Columbia and Appellant in the District of Columbia Court of Appeals, petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals which declimed to rule on petitioner's contention that the Superior Court lacked jurisdiction over a Maryland resident, and lacked jurisdiction over funds received by that Maryland resident from a Connecticut corporation.

Joseph Berman also petitions for a writ of certiorari to review the decision of the District of Columbia Court of Appeals denying jury trial to petitioner and affirming the summary judgment of the Superior Court of the District of Columbia assessing liability on the finding;

***, on the record brought here there was no genuine issue of material fact such as would have precluded the grant of partial summary judgment on the issue of appelant's liability to GHA.

OPINION BELOW

The opinion of the court of appeals (App.A, infra pp. 1-3) is not reported. It affirmed as to liability of defendant (petitioner here) to GHA (respondent here), but was vacated as to damages on basis of the violation of the Seventh Amendment to the Constitution, and remanded to the Superior Court of the District of Columbia for jury trial as to damages. The jury trial has not been scheduled.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on March 20, 1974. (App.A, infra, pp. 1-3). A petition for rehearing was denied, per curiam, April 3, 1974 (App.B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals correctly ignored and refused to rule on whether the Superior Court of the District of Columbia properly accepted personal jurisdiction over a Maryland resident (Petitioner) and the funds received by the Maryland resident from a Connecticut corporation.[1]

2. Whether the court below erred in:

A. Granting summary judgment, denying trial by jury without any evidence for respondent while

disregarding all evidence produced by petitioner;

B. Holding petitioner responsible for the production of original bylaws, when it was clearly evident that respondent would be the only one in possession of them, and did not produce same when petitioner officially requested them under Civil Rule 34 of the Superior Court of the District of Columbia;

C. Not considering the acts of waiver on the part of respondent, or at the very least, remand to have issues submitted to a jury as petitioner requested.

CONSTITUTIONAL QUESTIONS INVOLVED

The power of the various States and the District of Columbia, as to jurisdiction, is to be exercised only to the extent allowed under provisions of the Due Process clause of the Fourteenth Amendment to the Constitution.

It is basic under the Seventh Amendment to the Constitution that a trial by jury is a must, where there is an issue to be tried.

1/ Respondent and the court below have tacitly admitted that the court had no jurisdiction over the funds paid by the Connecticut corporation. Respondent made no claim against the Connecticut corporation, and only made claim against petitioner approximately fifteen months after the fact, while all this time fully knowledgeable of the Connecticut corporation obligation.(R.61, 80-83).2/

2/ "R" refers to the record as it was transmitted to the District of Columbia Court of Appeals from the Superior Court.

STATUTES INVOLVED

The District of Columbia Long-Arm Statute, 13-D.C. Code par. 423(a),1 and (b).

STATEMENT OF THE CASE

Petitioner (Joseph Berman) became a participating family member of the prepaid (R.30,84)[2] Group Health Association,Inc. (GHA), the respondent on March 2, 1953. (R.61). At that time the bylaws of GHA contained no "double coverage" provision (R.61), and, in fact, encouraged maintenance of secondary insurance (R.61). Petitioner remained a member of GHA until September 1, 1970 (R.30,79). Petitioner, during much of this period, maintained and paid for a secondary insurance by Aetna Life and Casualty Co., a Connecticut Corporation. Respondent had full knowledge of this Aetna insurance, repeatedly facilitated petitioner to collect from Aetna and made no claim for any of these funds over approximately a ten year period (R.81,82,83).

On, or about, June 26, 1961, the GHA Board of Trustees "approved and adopted" par.2;5(5) of their bylaws.[3] However the bylaws then in effect (up to June 26, 1961) specifically forbade the Board of Trustees to adopt such new bylaws. (R.61,80 par.d). Thus the bylaw upon which this suit was initiated is, on its face illegal, a fact not denied by the respondent in this case. For approximately a ten year period after the illegal "promulgation" of this bylaw, respondent continued to assure petitioner that this bylaw would not be activated as far as he was concerned. (R.61,par.3,R.80 par.f).[4]

---

[3] Respondent never presented any data, either as evidence or otherwise, as to the date of

Respondent had its administrative offices in the District of Columbia with clinics in Maryland and the District of Columbia. Petitioner lived in the District of Columbia until June 30, 1967 (R.16), at which time he moved into the state of Maryland. The funds in dispute are those collected by petitioner in 1970, while a Maryland resident, from Aetna Insurance Company, a Connecticut corporation. Respondent had no control over the collection of these funds by petitioner from Aetna. Petitioner could have put in a claim for $1.00 or $1,200.00, or no claim at all; respondent admittedly had no control of this.[3]

Because the question of liability evidently hinged on the production of the original contract (bylaws), in that the court below stated:

> Appellant, for reasons best known to himself, did not append a copy of the contract to his opposition to the motion for partial summary judgment as required by Super. Ct. Civ. R. 56 (e).

"promulgation" of this so-called "double-coverage" bylaw. This did not seem to bother the District of Columbia Superior Court. However, petitioner presented its accepted history. If the case had gone to trial, petitioner was prepared to present evidence that the bylaw quoted had never been voted on in the proper manner, and that active deceit of the members was practiced in this situation. (R.61,62,80)

[4] It was not activated for approximately 10 years, although there were many opportunities to do so. One might reason that respondent, at these early dates assured petitioner that this bylaw would not be applied to him so as to forestall litigation at that time, while the illegality was "fresh".

Let us look into the efforts made to secure such a document.[6]

1. Defendant (petitioner) was never issued a complete copy of the original bylaws and never received a modified copy until November, 1972. (R.79, par.b).

2. Although never having issued a complete copy of the original bylaws, GHA (Respondent) continued to transact business with petitioner on basis of original bylaws, not later modification. (R.80 par.d).

3. Since respondent never issued original bylaws to petitioner, and they (GHA) were the logical, and only, custodian of such bylaws, petitioner formally requested, on July 18, 1972, in accordance with Civil Rule 34, that Respondent produce same. (R.24 par.(1)d). Having found that, contrary to reply of respondent, the original contract or modifications were not forthcoming, petitioner requested the court to order their production. The court did so (R.34). On October 24, 1972, although not specifically answering petitioner's request, or the courts order of September 19, 1972, respondent submitted an affidavit to the effect; (R.39)

> That we have no other documents that have not been turned over to the defendant (petitioner) in this case.

5/ If petitioner had put in a claim to Aetna for $1.00 and was subsequently paid by Aetna, respondent would, if at all, admittedly have made a claim for only $1.00.

6/ It could be strongly argued that Rule 56(e) could be easily interpreted otherwise. If there is no contract available, can we not look at the next best evidence?

Apparantly respondent is making the suprising statement that this multi-million dollar corporation maintains none of its previous bylaws.

REASON FOR GRANTING THE WRIT

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED IN NOT DISMISSING THIS CASE ON THE ISSUE OF JURISDICTION. IT FURTHER ERRED FOR NEGLECTING TO EVEN CONSIDER AND RULE ON WHETHER THE DISTRICT OF COLUMBIA SUPERIOR COURT HAS JURISDICTION OVER A MARYLAND CITIZEN NOT DOING BUSINESS IN THE DISTRICT OF COLUMBIA, AND CONCERNING FUNDS WHICH HAVE NO CONNECTION WITH THE DISTRICT OF COLUMBIA.

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B. HOLDING PETITIONER RESPONSIBLE FOR THE PRODUCTION OF THE ORIGINAL BYLAWS, WHEN IT WAS CLEARLY EVIDENT THAT RESPONDENT WOULD BE THE ONLY ONE IN POSSESSION OF THEM,-AND DID NOT PRODUCE THEM WHEN REQUESTED TO UNDER CIVIL RULE 34 AND THE SUBSEQUENT ORDER OF THE SUPERIOR COURT; AND

C. WITHOUT CONSIDERING THE ACTS OF WAIVER ON THE PART OF RESPONDENT TO ESTOP RESPONDENT, OR TO AT LEAST, REMAND FACTS FOR A JURY.

Jurisdiction:- The petitioner has been a resident of the state of Maryland since July 1, 1967. This litigation arises out of medical services in 1970. The funds involved have nothing to do with the District of Columbia and respondent admits as much. It is true that petitioner did have a contract with the respondent for a number of years, and respondent does have its main office(and I believe is incorporated) in the District of Columbia. However petitioner did not seek a contract with res-

pondent because he was located in the District. Petitioner had no control over where the head office was located, as it is the only such pre-pay medical and hospitalization in the area. Petitioner had no control of where the surgery or hospitalization would be performed. In fact petitioner was very reluctant to have any surgery. Payment for the services is not in dispute. Respondent admits it was paid on a monthly basis. (R.30,61). The very connotation "pre-paid" indicates that members pay in advance for services rendered. Petitioner made such payments from March, 1953 to September, 1970. Consequently the only question remains is who is to receive the funds claimed by petitioner, a Maryland resident, from Aetna Life and Casualty Co., a Connecticut corporation. Respondent has no control over the amount of these funds. Petitioner paid for the right to collect, and petitioner maintains control over how much to collect,- from zero dollars to a limited maximun. If petitioner chose not to claim, or even chose to return the funds to Aetna, Respondent, by their own theory, would have nothing to collect. Respondent made no adjustment to petitioner's premiums so as to deserve a windfall from petitioner's payments for other insurance.

The so-called long-arm statute of the District of Columbia had no intention to eliminate all restrictions on personal jurisdiction of State courts. The District of Columbia courts are, of course, on the same level as State courts. King v. Wall and Beaver Street Corp., 145 F. 2d 377, U.S. App. D.C. (1944). In discussing this long-arm statute when proposed in 1969, the U.S. Senate, in Senate Report No. 405, 91st Congress, 1st Session (1969) stated (p.35):

> Chapter 4 more specifically grants expanded basis of jurisdiction and modes

of service identical to or reciprocal with those provided under the laws of the nearby State of Maryland for the courts of that State,***.

The power of the various States and the District of Columbia, as to jurisdiction, is to be exercised only to the extent allowed under provisions of the due process clause of the Fourteenth Amendment to the Constitution. The courts in the State of Maryland have consistently so held. In Eastham v. Young, 243 A.2d 559, 250 Md. 516 (1968) the court stated:

> Ordinarily one is entitled to be sued in the county of his residence, in equity or in law.
> * * * * * * * *
> An ordinary suit for a specific performance against a sole defendant must be brought in the county wherein that defendant resides,***.

In Capron v. Mandell, Ct.app. Md.(1968), the court stated (p.895):

> The privilege of a defendant to be sued only in the county of his residence is a substantial right***.

These findings, supra, are situations even within a state.

Unilateral activity of GHA with the petitioner, a Maryland resident cannot satisfy the requirement that one must purposefully avail himself of the privilege of conducting business within the District of Columbia. True, petitioner is a resident of Maryland, relatively close by the District of Columbia. If he were a resident of Denver, Colorado, would it still be "due process" to permit a District of

Columbia corporation to sue this Colorado resident in the District? Petitioner believes it would not be. Who is to decide the geographic limitation? There is a great difference between a foreign corporation transacting, or soliciting business in the District of Columbia, and a non-resident individual paying fees for services supplied by a corporation that incidently has its administrative office in the District. Suppose GHA were to move its offices to Alabama? To the petitioner herein, the location of respondent's office in the District of Columbia was of no advantage, and he did not deliberately seek out the District of Columbia as a locale to transact his business. For GHA to have instituted suit in Maryland, where it maintains offices and clinics, and where petitioner resides, would not have done violence to the principle of "due process" of the Fourteenth Amendment to the Constitution.

The court's finding that it had jurisdiction because;

> *** the defendant (petitioner) was employed in the District of Columbia until 1970,***.(R.23)

is obviously in error. Petitioner's Federal Government employment has nothing to do with the issues in this litigation. Congress meant to specifically exclude such tenuous jurisdictional claims. In the House of Representatives, report H.R.Rep. No. 707, 91st Cong., 2d Sess., 1970 (p.163) states jurisdiction is;--

> to be limited to claims arising from the specified connection.

Paragraph 13-423(b) of the D.C. Code (Supp.IV,

1971) states:

> When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

The long-arm statute does not authorize the court to enter judgment in respect to property over which the court has no jurisdiction. The subject judgment is for funds which petitioner, a Maryland resident, received from Aetna Insurance, a Connecticut corporation. There is no dispute over GHA's obligation. They have admitted that they were obligated. (R.11 par.5). There is no dispute over petitioner's pre-payment of premiums. GHA has admitted that they were paid. (R.14 par.2; R.30 par.2; R.41 par. 1 & 2). The word "reimbursement" by respondent is a semantic by-play. They are admittedly only asking for the money paid by Aetna, the Connecticut corporation, to petitioner, a Maryland resident. GHA had no control over how much that sum would be. As far as GHA, the respondent, is concerned, it could be any figure from $1.00 to $1,500.00. Petitioner need not have collected one cent and respondent admits that, in such case there would be no claim by respondent. It appears that respondent's claim is an effort to intimidate individuals, not necessarily for the benefit of respondent, but more for the benefit of Aetna Insurance. Over this transaction the District of Columbia Court has no jurisdiction. The petitioner did not engage in any persistent course of conduct in the District of Columbia.

In Hanson v. Denckla, 357 U.S. 235 (p.250) the court said (p.251):

> ***the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714 to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of respective states.

The same Court also stated (p.253):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.

The concepts, supra, are directly applicable to the instant case wherein respondent unilaterally acted in soliciting premium payments from petitioner, a non-resident. If the Superior Court's action as to jurisdiction were upheld in the instant case, then the same reasoning would allow Sears Roebuck and Company to bring suit within its home jurisdiction, Philadelphia, against any one of its thousands of customers, throughout the land. Is this the "due process" as required by the Constitution? Petitioner thinks not and the courts have agreed.

Petitioner contends that on this issue the court below erred in not considering or ruling on jurisdiction (App. A, infra), and in not directing the Superior Court to grant petitioner's Motion to Dismiss. (R.16 par.2).

Summary Judgment:- Respondent, in its argument, relied wholly on the case of Leroy W. White v. Group Health Association, Inc., 7/ 294 A. 2d 870, D.C. App.(1972). The case was litigated in the Superior Court of the District of Columbia (not reported) and affirmed in the District of Columbia Court of Appeals. Respondent presents no facts in respect to that case, and makes no attempt to correlate the facts in the case at bar with that case. Petitioner does investigate the facts in the record (R. 61,79,80) and found;

A. The bylaw respondent relied on, and quotes in his brief, and from which the District of Columbia Court of Appeals (App. A, infra, p.2) makes the statement that;

> The validity of such a provision was upheld in White v. Group Health Association, ***.

was not a matter of litigation in the White case. (ibid). That case was tried on an affidavit, by an executive of the respondent herein, accompanying a motion for summary judgment to which White's attorney neglected to file an opposition. (R. 84,85,86). Since the affidavit was not challanged,-White's attorney failed to file an answer, and since it was not objected to in the pleadings8/, no question was raised in that case as to the legality of the so-called "double coverage" bylaw. The court of appeals assumed that it was legal and said as much in a footnote. I cannot conceive of this Court condemning all future litigants to be penalized by the neglect or incompetence of an attorney in an earlier case, together with an assumption of legality by a court below.

7/ This is not in the record but is referred to in its argument to the Superior Court and in its brief to the Court of Appeals.

The evidence in this case is to the effect that this bylaw, which is the core of respondent's case, was illegally "promulgated" (R.62, 80 par. d), and respondent does not deny this. The evidence also shows that, by its acts and its statements to petitioner (R.61, par.2,3,4, R. 64,65,66,67,80 par. d & f, 81,82,83), respondent did not consider it a legal entitity and did everything in its power, over almost a ten year period, (until this litigation) to prevent petitioner from raising the issue.

All the uncontroverted evidence,supra, is in the record. However, it was completely ignored by the District of Columbia Court of Appeals and the trial court. Based on the evidence, the courts certainly could have granted summary judgment to petitioner, but to grant summary judgment to respondent, the courts must have necessarily ignored the evidence.

B. The District of Columbia Court of Appeals in its affirmation of summary judgment for respondent complains (as a primary factor in granting summary judgment), in denying any weight to petitioner's affidavit which distinguishes his individual contract from a group contract (App. A, infra, p.2);

> ***as was the case in White. Appellant for reasons best known to himself, did not append a copy of the contract to his opposition to the motion for partial summary judgment as required by Super. Ct. Civ. R. 56 (e), and it does not appear that any such contract was ever brought to the attention of the trial court.

8/ Where it did not appear.

The evidence in the case at bar is directly contrary to the court's statement. On pages 4,5 and 6 of this petition the evidentiary facts are set out. It may also be of interest here in pointing out that a previous District of Columbia court has, in Backus v. Veterans Co-op Ass'n., 96 A.2d 513, D.C. Mun. App. (1953) stated; (p.514)

> Burden of establishing terms of contract rests upon party suing there-on.

Respondent, the sole custodian of such contract [9] never produced it either in response to petitioner's official requests (R.24,32,33,72) or the court's order (R.34).

C. Repeated acts of waiver, if the bylaw sued on is to be accepted as legal, were committed. These acts began by respondent in 1961, and continued uninterrupted each year thereafter until August 1971. These acts reflect waivers as to situations identical to the one here being litigated. Respondent does not deny these acts of waiver set out in the evidence, (R.61,63,64,65, 66,67,79 par.c,81,82,83), nor did the trial court address itself to these acts of waiver. The appeals court ignored any mention of them. Many court cases have been litigated as to waiver with the consequental estoppel therefrom. Petitioner has presented clear unrefuted evidence in this case, and the courts below certainly should have considered this evidence.

9/ The trial court accepted the existence of this original contract because in its ruling on jurisdiction (R.23), the court referred to this "written contract" as the main basis of its order.

CONCLUSION

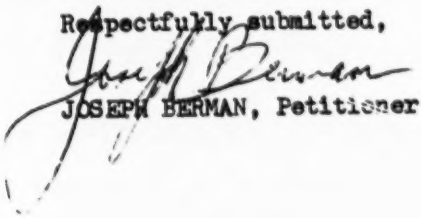
Petitioner feels that the trial court has improperly interpreted the extent of the District of Columbia so-called Long-Arm statute (D.C.Code par.13-423) and has violated petitioner's right to due process as required by the Fourteenth Amendment to the Constitution. Petitioner contends that the District of Columbia Court of Appeals erred in not considering this issue, not considering the evidence thereof, and not ruling on the jurisdiction problem in this case.

Petitioner also feels that the court below erred in affirming the granting of summary judgment to respondent,- respondent who presented no evidence to refute or deny the preponderant evidence presented by petitioner. In this case, the courts below have accepted the doctrine of collateral estoppel in favor of respondent although the evidence clearly shows that (in White v. Group Health Association, Inc., supra) petitioner, and in fact White, had no opportunity to litigate the issue of the legality of the by-law on its merits. See Beacon Theatres v. Westover, 359 U.S.500,79 S. Ct.948 (1959) and Rachal v. Hill, 435 F. 2d 59 (1970).

The instances of waiver and consequent estoppel as to respondent are numerous and repeated in the evidence. They have been summarized and the evidence referred to supra. It is indeed difficult to understand how the courts below simply ignored them to the detriment of petitioner.

Wherefore petitioner prays that this Court grant the writ of certiorari sought herein.

Respectfully submitted,



JOSEPH BERMAN, Petitioner

Appendix:

A. Decision of the District of Columbia Court of Appeals, pp.1-3 - - - - - - - - - - - - -

B. Order, filed April 3, 1974, denying petition for rehearing of the District of Columbia Court of Appeals decision.- - - - - - - -

App. A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7356

JOSEPH BERMAN, APPELLANT,

v.

GROUP HEALTH ASSOCIATION, INC., APPELLEE.

Appeal from the Superior Court
of the District of Columbia

(Argued December 6, 1973 Decided March 20, 1974)

Joseph Berman, pro se.

Joel M. Savits, with whom *William H. Seckinger* was on the brief, for appellee.

Before GALLAGHER, PAIR and YEAGLEY, Associate Judges.

PAIR, *Associate Judge:* This appeal is from a judgment entered in the Civil Division of the Superior Court granting Group Health Association (GHA) recovery for moneys received by appellant under a health insurance policy with another insurer. Appellant makes numerous claims of error but we find it necessary to consider only whether the court erred in (1) granting GHA's motion for partial summary judgment, and (2) denying him a jury trial.

GHA complained against appellant demanding "any payments or benefits received by him under any accident or health plan other than that of G.H.A." In his answer

to the complaint, appellant admitted that he had received benefits under a health and accident insurance policy carried by the Aetna Life and Casualty Company, but insisted that he, not GHA, was entitled to the moneys.

By Article II, Section 2:5(5) of the Bylaws of GHA, it was provided:

> Any person accepting medical or dental treatment or attendance or hospitalization services procured by GHA shall be deemed by so doing to have . . . (5) agreed that, if the member or dependent receives benefits under an accident or health plan, other than through a plan of GHA, for services provided at GHA's expense, GHA reserves the right to obtain reimbursement from the member (and/or dependent) for the cost of the services provided (and/or reasonable value of the services provided) . . . .

The validity of such a provision was upheld in *White v. Group Health Association*, D.C.App., 294 A.2d 870 (1972). Appellant contends, however, that *White* is distinguishable because his was an individual contract with GHA and not a *group* health contract as was the case in *White*. Appellant, for reasons best known to himself, did not append a copy of the contract to his opposition to the motion for partial summary judgment as required by Super. Ct. Civ. R. 56(e), and it does not appear that any such contract was ever brought to the attention of the trial court. We cannot, of course, consider any matter not of record.[1]

Thus, on the record brought here, there was no genuine issue of material fact such as would have precluded the

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[1] *Dietz v. Miles Holding Corp.*, D.C.App., 277 A.2d 108, 110 n. 3 (1971).

grant of partial summary judgment on the issue of appellant's liability to GHA.

While the entry of the summary judgment determined that appellant was answerable to GHA for some amount, it did not determine the amount. Thus, the extent of appellant's liability to GHA remained the subject of inquiry. *Barber v. Turberville*, 94 U.S.App.D.C. 335, 218 F.2d 34 (1954).[2] The trial court thereupon caused the case to be set down on the nonjury calendar for trial on the issue of damages only, and at the completion thereof a judgment in the amount of $1,203.11 was entered in favor of GHA.

What the record discloses, however, is that appellant filed a timely demand for a jury trial and that a deposit was accepted by the clerk of the court. Such a trial is basic under the Seventh Amendment to the Constitution, and the action—whether characterized as one for the recovery of moneys or a suit on a contract—is triable by jury. *See Simler v. Conner*, 372 U.S. 221 (1963). *See also* 47 AM. JUR. 2d *Jury* §§ 42-44 (1969). There is no showing in the record that appellant withdrew his demand for a jury trial nor is there any showing of a waiver—expressed or implied—of the jury trial which had been demanded.

Because the record is barren as to the reason, if any, for denying appellant a jury trial, we vacate the judgment as to damages and remand the record with directions to reinstate the jury demand and for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

---

[2] *See also Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937).

App. B

District of Columbia
Court of Appeals

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED APR 3 1974
Alexander L. Stevas
Clerk

No. 7356

JANUARY TERM, 19 74

JOSEPH BERMAN,
Appellant,

v.

CA-2119-72

GROUP HEALTH ASSOCIATION, INC.,
Appellee.

BEFORE: Gallagher, Pair and Yeagley, Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing, it is

ORDERED that appellant's petition is denied.

PER CURIAM.

Copies to:

Honorable Milton D. Korman
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

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SUPREME COURT, U. S.

SUPREME COURT, U. S.
FILED
AUG 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1962

JOSEPH BERMAN, *Petitioner*

v.

GROUP HEALTH ASSOCIATION, INC.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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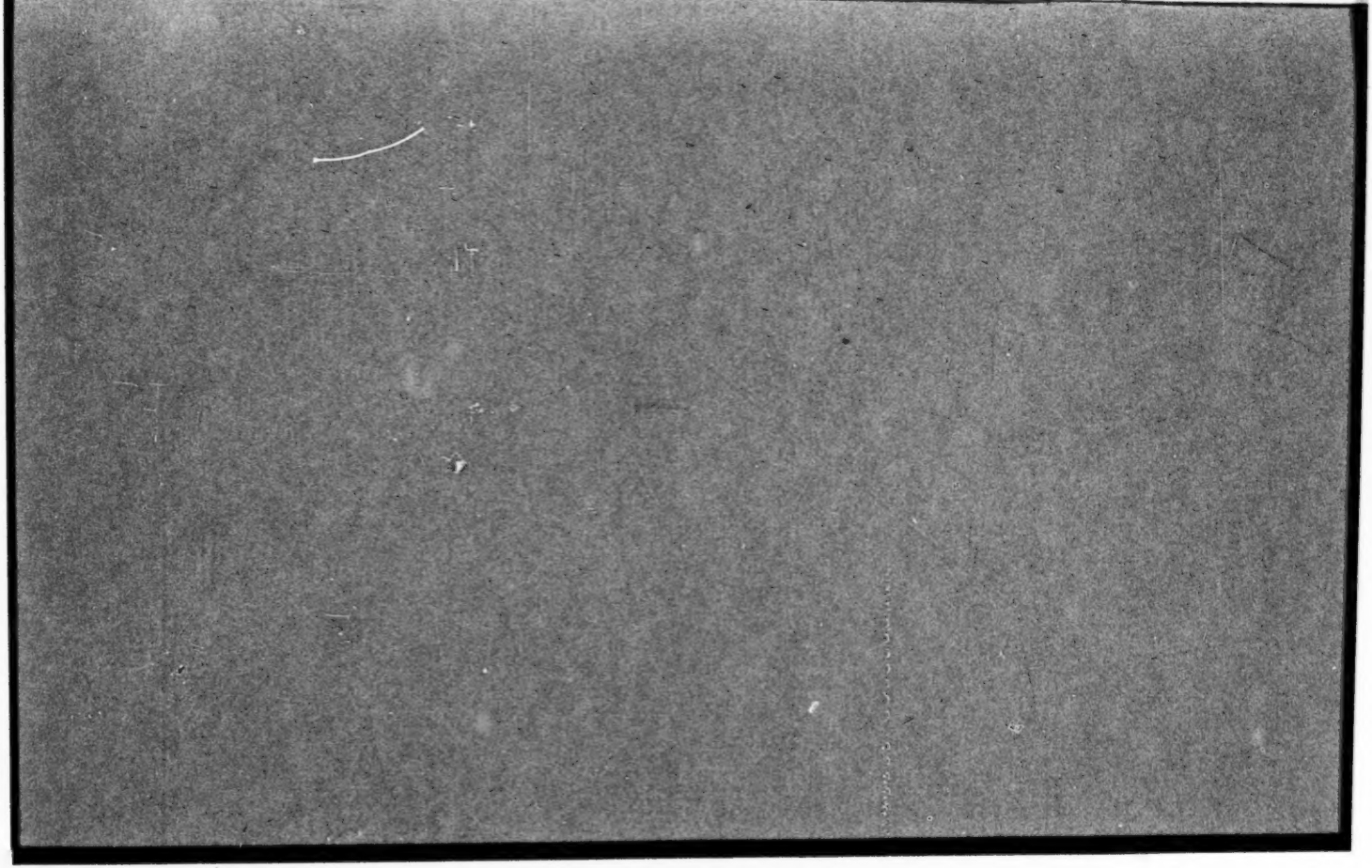

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Group Health Association, Inc. (GHA) brought this action to recover from petitioner, a member of GHA, a payment made to him by Aetna Life and Casualty Company for medical services rendered petitioner by GHA. Such recovery is specifically authorized by the by-laws of GHA:

> Any person accepting medical or dental treatment or attendance of hospitalization services procured by GHA shall be deemed by so doing to have * * *

> (5) agreed that, if the member or dependent receives benefits under an accident or health plan, other than through a plan of GHA, for services provided at GHA's expense, GHA reserves the right to obtain reimbursement from the member (and/or dependent) for the cost of the services provided (and/or reasonable value of the services provided) * * * with the proviso, however, that benefits received from such third source which are predicated solely on items of special damages (such as loss of income) which cannot be allocated to hospital and/or medical expenses shall not be subject to a claim for reimbursement by GHA; * * * *.

Article II, ¶ 2:5(5) (see Pet. App. A, p. 2).

Petitioner contends, as he did in the courts below, that the Superior Court of the District of Columbia lacked personal jurisdiction over him as a resident of Maryland, despite applicable provisions of the District of Columbia "long-arm" statute.[1] Petitioner further contends that the application of the "long-arm" statute to obtain jurisdiction over his person violates "due process" concepts (Pet. 7-12). The court below considered these issues so insubstantial as not to warrant any comment (Pet. App. A, p. 1).

Petitioner also asserts that the courts below committed error in entering and affirming summary judgment for GHA on the issue of liability. Petitioner asserts that the Seventh Amendment provides a right to trial by jury where an issue exists as to the

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[1] Title 13 *D.C. Code* § 13-423 (a)(1):

> "A District of Columbia court may exercise personal jurisdiction over a person * * * as to a claim for relief arising from the person's transacting any business in the District of Columbia * * *".

facts presented before the court (Pet. 13-15). However, as the court below correctly held, where there are no material facts to dispute the claim of a party, entry of summary judgment is justified and no violation of the Seventh Amendment arises (Pet. App. A, pp. 2-3). That situation is present here since petitioner refused to submit the GHA contract under which, he claimed, GHA had no right to recover (*Ibid.*, p. 2).

In sum, then, both of the issues petitioner seeks to present are entirely without substance, and involve issues solely of District of Columbia law passed upon by the appropriate local courts. No substantial federal or constitutional question is raised, and no decision of this Court conflicts with the holding below. The petition for a writ of certiorari should therefore be denied.

1. The present action centers on questions which are completely settled in the District of Columbia, as well as in other jurisdictions. In promulgating Title 13 *D. C. Code* § 423, the Senate Committee on the District of Columbia reported that the section

> specifically grants expanded basis of jurisdiction and modes of service identical to or reciprocal with those provided under the laws of the nearby State of Maryland for the courts of that State, and substantially the same as those provided in the adjacent State of Virginia and approximately 10 other States. [2]

This section has been afforded an expansive interpretation in both Maryland and Virginia. [3]

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[2] S. Rep. 405, 91st Cong., 1st Sess. 35 (1969).

[3] See *Gilliam* v. *Moog Industries, Inc.*, 210 A. 2d 390, 392 (Md., 1965); *Groom* v. *Margulies*, 265 A. 2d 249 (Md., 1970); *John G. Kolbe, Inc.* v. *Chromodern Chair Co.*, 180 S.E. 664 (Va., 1970).

There can be no question that sufficient contacts existed with the District of Columbia to exercise jurisdiction over the petitioner under the long-arm statute. This litigation involves a contract between the parties entered into in the District of Columbia. Petitioner was a resident of the District of Columbia and employed there when he joined GHA. The hospitalization for which GHA bore the expense, pursuant to the bylaws of GHA, was at the Washington Hospital Center in the District of Columbia. The contention that GHA, a non-profit organization incorporated and with offices in the District of Columbia, in rightfully asserting its claim against petitioner could not bring suit in the District of Columbia is completely without merit.

Petitioner's "due process" claim also borders on the frivolous. Jurisdiction under similar long-arm statutes in other states has been consistently given broad construction. *See e.g., Parke-Benet Galleries, Inc.* v. *Franklin,* 26 N.Y. 2d 13, 256 N.E. 2d 506 (Ct. App. N.Y. 1970) (long-arm jurisdiction over a California defendant upheld on the basis of a telephone call through which defendant participated in an auction); *State Ex Rel. White Lumber Sales, Inc.* v. *Sulmonetti,* 448 P.2d 571 (Ore., 1968) (long-arm jurisdiction over a Florida lumber wholesaler who made an order by telephone from an Oregon wholesaler). Such construction is authorized by *Hanson* v. *Denckla,* 357 U.S. 235 (1958), which held that jurisdiction under a long-arm statute is valid when the defendant

> purposely avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. [357 U.S. at 253].

The contacts petitioner had with the District of Columbia are certainly as substantial as those evidenced in the above New York and Oregon cases.

In addition, the question does not encompass more than the particular facts relevant to this action; the petitioner fails to proffer any substantive constitutional rebuttal of the lower courts' jurisdiction (Pet. 7-12).

2. Petitioner's other principal contention is that the lower courts improperly granted and affirmed summary judgment for GHA. Petitioner somewhat surprisingly argues that a prior District of Columbia decision failed to uphold the validity of the relevant GHA bylaw provisions. He argues that in *White* v. *Group Health Association,* 294 A.2d 870 (D.C. App., 1972), "no question was raised as to the legality of the so-called 'double coverage' bylaw" (Pet. 13). But the court in *White* expressly stated:

> It is evident that summary judgment was granted on the merits and not by reason of appellant's failure to oppose it.

294 A.2d at 871.

Similarly, petitioner's other points in opposition to summary judgment rest upon factual issues relevant only to the present case and resolved by the lower courts in favor of GHA. There can be no question that the issue of liability in this action properly resulted in summary judgment for GHA, particularly since petitioner, in opposing summary judgment, failed to submit the contract which he claims supports his position.

Although petitioner now claims that the absence of discussion in regard to the many questionable "issues" he raised reveals "error" by the lower courts, the fact is that the courts considered the issues so completely devoid of merit that it was unnecessary to discuss them in the opinion (Pet. App. A, p. 2). The findings of the court below were correct and further review is not warranted.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 1974

Supreme Court, U. S.
FILED
AUG 14 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1962

JOSEPH BERMAN,

Petitioner

v.

GROUP HEALTH ASSOCIATION, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

JOSEPH BERMAN, Petitioner
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Ventnor, N.J. 08406

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1962

JOSEPH BERMAN, PETITIONER

v.

GROUP HEALTH ASSOCIATION, INC., RESPONDENT

On Petition for a writ of Certiorari to the
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REPLY BRIEF FOR THE PETITIONER

Respondent, in its "Memorandum for the Respondent in Opposition" states as to the issue of JURISDICTION (Respondent at page 2);

> The court below considered these issues so insubstantial as not to warrant any comment.

Respondent presumes to speak for the court below. Petitioner would be less presumptuous if he were to state that the Court of Appeals stayed away from the issue because of its complexity and importance, with the hope that it thus would be

ended. Petitioner does not propose to speak for the court. Certainly the issue is not yet completely settled as can be seen from the abundance of recent litigation. Respondent refers to several cases dealing with "jurisdiction", petitioner cites others, and many more have been litigated.

Secondly, as to the issue of the "Contract" or the "Bylaws" of GHA, respondent quotes, on pages 1 and 2 in its opposition the alleged wording of Article II, Section 2;5(5) of the "bylaws" of GHA. This quotation is not found in any part of respondent's evidence in the trial court. The District of Columbia Court of Appeals culled this paragraph from unsworn argument (Points and Authorities) presented to the trial court and transmitted to the court of appeals as "part of the record" contrary to petitioner's request. Respondent repeats this paragraph in his Opposition without indicating that it is not part of the evidence. Surely our courts do not accept argument as evidence, and the courts below certainly erred in so doing. Whatever the wording of the bylaw, respondent admits, as was pointed out in the Petition (page 14), that it was illegally "promulgated".

For these reasons and the more detailed reasons set out in the Petition, petitioner prays that this Court grant the writ of certiorari sought.

Respectfully submitted,

JOSEPH BERMAN, Petitioner

I hereby certify that 3 copies of this Reply was mailed this 12th day of August, 1974, to Joel M. Savits, attorney for respondent.